STATE OF MICHIGAN

COURT OF APPEALS

KATHY FRAGOULES,

Plaintiff-Appellee/Cross-Appellant,

v

ANTHONY ATKINSON,

Defendant-Appellant/Cross-Appellee,

and

BRISTOL MYERS SQUIBB COMPANY, STEVE SHOCKLEY, and JOHN VOSS,

Defendants.

UNPUBLISHED
March 13, 2003

No. 232996
Kent Circuit Court
LC No. 98-001972-NZ

KATHY FRAGOULES,

Plaintiff-Appellee/Cross-Appellant,

v

STEVE SHOCKLEY,

Defendant-Appellant/Cross-Appellee,

and

BRISTOL MYERS SQUIBB COMPANY, JOHN VOSS, and ANTHONY ATKINSON,

Defendants.

No. 235256
Kent Circuit Court
LC No. 98-001972-NZ

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendants Anthony Atkinson and Steve Shockley appeal by leave granted the trial court's partial denial of their separate motions for summary disposition of plaintiff's claim of intentional infliction of emotional distress (IIED). Plaintiff Kathy Fragoules cross appeals by leave granted the trial court's grant of summary disposition to Atkinson and Shockley of her constructive discharge claim. We reverse in part and affirm in part.

Defendants Shockley and Atkinson argue that the trial court erred in not granting their motions for summary disposition under MCR 2.116(C)(10) because no material factual dispute existed with regard to whether Atkinson's conduct rose to the level of extreme and outrageous necessary to support plaintiff's IIED claim. We agree. This Court reviews de novo a trial court's ruling on a party's summary disposition motion. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Because a motion under MCR 2.116(C)(10) tests the factual support for a claim, affidavits, admissions, and documentary evidence are considered in the light most favorable to the opposing party to determine whether the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

To establish an IIED claim, the plaintiff must prove: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 342; 497 NW2d 585 (1993). The conduct at issue must go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. *Id*. Mere insults, indignities, threats, or petty oppressions do not rise to the level of extreme and outrageous conduct. *Id*. Whether the conduct at issue may reasonably be considered so extreme and outrageous as to allow recovery is a matter that should be initially decided by the court. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995). However, where reasonable minds may differ, the issue is for the jury to decide. *Id*.

Atkinson's actions fall far short of extreme and outrageous conduct. See *Duran v Detroit News, Inc*, 200 Mich App 622, 630; 504 NW2d 715 (1993); *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 346-347; 483 NW2d 407 (1991); *Trudeau v Fisher Body Div, General Motors Corp*, 168 Mich App 14, 20; 423 NW2d 592 (1988). Plaintiff claims that she was humiliated when Atkinson gave her the "silent treatment." She also claims to have been humiliated when, while she and Atkinson were sitting in a physician's waiting room, Atkinson talked about making payments to doctors so they could conduct studies. Plaintiff also claims that Atkinson screamed at her and criticized her performance while walking down a public hallway and physically intimidated her when they were together in her car. This behavior, even if insulting, does not rise to the level of being "utterly intolerable in a civilized community." See *Graham v Ford*, 237 Mich App 670, 674-675; 604 NW2d 713 (1999).

Further, a person is not liable for causing someone emotional distress when the distress results from the exercise of legal rights. *Warren v June's Mobile Home Village & Sales, Inc*, 66 Mich App 386, 391; 239 NW2d 380 (1976). Plaintiff argues that Atkinson had "virtual absolute control" of her job; however, that is the role of a supervisor. Supervisors criticize work performance – some do it well, some do not. Even supervisors who exercise poor judgment, persist in rudely criticizing an employee, and cause the employee embarrassment or humiliation are not exhibiting a level of conduct that is intolerable to society. See *Fulghum v United Parcel Serv, Inc*, 424 Mich 89, 96-98; 378 NW2d 472 (1985); *Sankar v Detroit Bd of Educ*, 160 Mich

App 470, 482-483; 409 NW2d 213 (1987). Plaintiff also alleges that she was told to engage in illegal activities and when she did not, she was disciplined. Plaintiff has not provided sufficient evidence that she was criticized and disciplined for expressing her concerns about sales methods proposed by Atkinson or her failure to employ those methods. In fact, plaintiff admitted that Atkinson and Shockley likely were not aware that she was not using the methods and material to which she objected.

In sum, the trial court incorrectly concluded that a genuine issue of material fact existed with regard to Atkinson's conduct; even considered in the light most favorable to plaintiff, Atkinson's conduct was not extreme and outrageous. Because plaintiff cannot establish any disputed material fact with regard to Atkinson's conduct, Shockley, who merely supervised Atkinson, was not advised by plaintiff of Atkinson's alleged conduct, and had little direct contact with plaintiff, was also entitled to summary disposition. See *Chambers v Trettco, Inc (On Remand)*, 244 Mich App 614, 618-619; 624 NW2d 543 (2001); *Meagher v Wayne State Univ*, 222 Mich App 700, 728-729; 565 NW2d 401 (1997).

Plaintiff argues on cross appeal that the trial court erred when it granted Shockley's and Atkinson's motions for summary disposition regarding her constructive discharge claim. We disagree.

Plaintiff claims that she was constructively discharged, in violation of public policy, after she refused to participate in illegal or unethical promotional programs. See *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). "[A] constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Jacobson v Parda Fed Credit Union*, 457 Mich 318, 325-326; 577 NW2d 881 (1998), quoting *Champion v Nationwide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996).

Here, plaintiff failed to establish that her refusal to employ the alleged illegal or unethical promotional programs resulted in Shockley's and Atkinson's conduct toward her, including their decision to place her on a warning program. Shockley's participation with regard to plaintiff's employment problems consisted of his approval of Atkinson's recommendation that plaintiff be placed on a warning program for failing to meet sales performance expectations. While Atkinson maintained more contact with plaintiff, plaintiff admitted that participation in the questionable sales promotions was voluntary, that Atkinson likely did not know that she was not participating in the chart review program, and that Atkinson did not react improperly when she refused to make slides using unapproved promotional materials. Further, plaintiff does not dispute Atkinson's assertions that she failed to meet sales expectations and daily call requirements at the time she was placed on the warning program. In addition, at the time she resigned, plaintiff appeared to be in compliance with the warning program and Atkinson was no longer her supervisor. In sum, plaintiff failed to establish a genuine issue of material fact that she was constructively discharged for refusing to participate in the disputed sales methods. Consequently, the trial court's summary dismissal of this claim was proper.

Affirmed in part and reversed in part. We remand for entry of an order dismissing plaintiff's IIED claims against defendants Atkinson and Shockley. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra